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In the Supreme Court of the United States

OCTOBER TERM, 1968

JACKSON MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 391 F. 2d 237.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1968. A petition for rehearing was denied on April 17, 1968. The petition for a writ of certiorari was filed on May 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory presumption arising out of unexplained possession of narcotics, set forth in 21 U.S.C. 174, violates the due process requirements of the Fifth Amendment.

2. Whether the statutory presumption in 26 U.S.C. 4704(a), covering possession of narcotics in a package not containing the requisite revenue stamps, comports with the due process requirements of the Fifth Amendment.

3. Whether the tax stamp and order form provisions of 26 U.S.C. 4704(a) and 26 U.S.C. 4705(a) impinge upon petitioner's privilege against self-incrimination.

STATEMENT

Petitioner was tried by a jury in the United States District Court for the Western District of Washington and was convicted on two counts each of unlawfully dispensing illegally imported heroin (21 U.S.C. 174), of selling heroin other than in or from the original stamped package (26 U.S.C. 4704(a)), and of dispensing heroin without having obtained a written order form from the transferee (26 U.S.C. 4705(a)). On January 27, 1967, petitioner received concurrent ten year sentences on each of the six counts. The court of appeals affirmed. 391 F. 2d 237.

Petitioner's guilt was established primarily through the testimony of an undercover narcotics agent, Joseph Gordon, who testified that on March 21, 1966, petitioner telephoned him to arrange for a sale of narcotics. Thereafter, the agent obtained $700 in government funds and met with petitioner who trans-

ferred 61.692 grams of heroin to the agent (2 R. 110, 112)[1] in exchange for the $700 (2 R. 43-51). The agent did not present any written order form to petitioner nor did the package of heroin which the agent received bear any revenue stamps (2 R. 52-53). On April 11, 1966, the agent gave petitioner $350 in exchange for 30 grams of heroin (2 R. 60-64, 114). Again, no order form was exhibited and no revenue stamps were affixed to the container of narcotics (2 R. 65, 67). Petitioner offered no testimony in his own behalf. On cross-examination, however, a government chemist testified that heroin could be manufactured from poppies grown within the borders of the United States and that it was impossible to determine whether a particular sample of heroin was of domestic or foreign origin (2 R. 117-119).

ARGUMENT

1. Petitioner attacks the rationality of the inference provided in 21 U.S.C. 174, permitting the jury to infer illegal importation and knowledge thereof from the unexplained possession of heroin. The mere fact that it is theoretically possible to grow opium poppies in the United States, and to make heroin from them, does not, however, render the inference irrational. We recognize, of course, that in *Leary* v. *United States*, No. 65, this Term, this Court has granted the petition for a writ of certiorari to review the validity of an analogous inference with re-

[1] "2 R." refers to the transcript of the trial proceedings, a copy of which is lodged with the Clerk of this Court.

spect to the importation of marihuana. Unlike that inference, however, the validity of the inference covering opium and its derivatives has been specifically upheld by this Court, *Yee Hem* v. *United States*, 268 U.S. 178, and this Court declined further review of a similar challenge even after the grant in *Leary. United States* v. *Miller*, 381 F. 2d 529 (C.A. 2), certiorari denied, No. 857, O.T. 1967 (June 17, 1968). There is no occasion to grant review here.

Unlike marihuana, which reportedly has grown in a wild state in the United States, the "[opium] poppy is one of the most delicate plants cultivated by man." *The Cultivation of the Opium Poppy in Turkey*, Bulletin on Narcotics, v.2 #1:p. 15 (1950). After approximately six months of growth—assuming the grower has properly weeded and thinned his acreage, and has protected the crop from frost, wind, storms, extreme moisture, extreme cold, and extreme warmth —the bulb of the opium poppy must be incised to collect the opium latex. Since incision and collection requires expert skill and must be done manually, the collection of latex from one hectare (2.471 acres) of land requires approximately 1280 working hours for a yield of about 7 kilograms of opium. United Nations Permanent Narcotics Board, *Report to the Economic and Social Council on the Work of the Board in 1966*, E/OB/22, p. xviii (1966). In a two-step process, raw opium is reduced to heroin. Morphine is first extracted from the raw opium. Ordinarily, 10 kilograms of opium will yield 1 kilogram of morphine. There is no equivalent reduction during the processing of morphine to heroin.

For the five year period 1962-1966, some 223,672 kilograms (734,078 pounds) of raw opium have been seized in international illicit traffic. United Nations Commission on Narcotic Drugs, *Review of the Illicit Traffic in Narcotic Drugs During 1966/1967*, E/CN. 7506, Annex II (1967). During that same period of time, however, only 16.14 kilograms (32 pounds) have been seized within the boundaries of the United States.[2] There has been no reported growth of the opium poppy in the United States for the past two decades,[3] nor have there been any seizures of heroin conversion laboratories within that time period. In these circumstances, permitting an inference that unless otherwise explained any particular sample of heroin seized in the United States had its origin in foreign opium can scarcely be said to lack the necessary rational connection "'between the facts proved and the ultimate fact presumed'." *United States* v. *Gainey*, 380 U.S. 63, 66.[4]

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[2] This figure includes 20 pounds of smoking opium seized in New York City in the possession of Chinese nationals, which, according to available evidence, originated in Singapore, not in this country.

[3] Growth of the opium poppy in the United States was made unlawful, with certain exceptions, by the Opium Poppy Control Act of 1942 (21 U.S.C. 188-188n).

[4] Petitioner's argument that Congress never intended the presumption to be operative when the origin of the narcotics was questioned is clearly rebutted by the precise and all-inclusive language of the statute—"*Whenever* * * * the defendant is shown to * * * have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction * * *." (Emphasis added.) Once the gov-

2. Petitioner also attacks, on due process grounds, the presumption contained in 26 U.S.C. 4704(a) that the tax imposed on narcotics (see 26 U.S.C. 4701(b)) has not been paid if the narcotics do not bear the appropriate Treasury stamps. Petitioner's argument rests, however, upon a misconception as to both the elements of the offense and the effect of the presumption contained in Section 4704(a). This section is designed to limit the commerce in narcotics to drugs upon which an importer, producer, manufacturer or compounder has paid the tax imposed by 26 U.S.C. 4701. Since the stamp is evidence of the payment of the tax, see 26 U.S.C. 4771, it is entirely reasonable to create a presumption that if the package bears no stamp the tax has not been paid. Since this presumption is based on a reasonable relationship between the fact established and the ultimate fact presumed, it satisfies the standard of due process. See *Vick* v. *United States*, 304 F. 2d 379, 380 (C.A.D.C.); cf. *Harris* v. *United States*, 359 U.S. 19, 20-21, 23; *Roviaro* v. *United States*, 353 U.S. 53, 63. Petitioner's contention that Congress did not intend that this presumption transfer the burden of proof to the defense is irrelevant. What Congress did clearly intend was to shift the burden of going forward with evidence once the government has established posses-

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ernment has established possession, a *prima facie* case is established. If the defendant wishes to cast doubt either on his knowledge of importation, or on his possession of the narcotics, or as here, on the foreign origin of the narcotics, he must go forward with some evidence that "explains the possession to the satisfaction of the jury."

sion of narcotics in an unstamped package. It was then incumbent upon the accused to satisfy the jury that the possession was rightful and that the tax had been paid. See *Roviaro* v. *United States*, 353 U.S. 53, 63.

3. Petitioner attacks the constitutionality of 26 U.S.C. 4704(a) and 4705(a) on the ground that compliance with these statutes would compel him to disclose information of an incriminatory nature. As petitioner's convictions on the two counts based on 21 U.S.C. 174 are supported by the evidence and not otherwise subject to substantial challenge, it is unnecessary to reach the constitutionality of petitioner's convictions under the questioned statutes on which he received concurrent sentences. See *United States* v. *Gainey*, *supra*, 380 U.S. at 65; *Lawn* v. *United States*, 355 U.S. 339, 362; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

In any event, nothing in the questioned statutes would have compelled petitioner to incriminate himself. Those sections are part of a comprehensive tax scheme (26 U.S.C. 4701-4736, 4771-4774) designed to limit dealings in dangerous narcotic drugs to legitimate purposes. Under the provisions of the statutes, and the implementing regulations, any person who wishes to deal (*i.e.*, import, manufacture, produce, compound, sell, deal in, dispense, or give away) in narcotic drugs must register and pay an occupational tax at a rate prescribed by law (26 U.S.C. 4721-4722; 26 C.F.R. 151.21, 151.41).[5] Persons may not register

[5] The registration must be renewed, and the tax paid, annually (26 C.F.R. 151.22).

under the provisions of the Act, or pay the tax, unless they can satisfy the Bureau of Narcotics, after an investigation, that they are qualified under state law to conduct the business or activity for which registration is sought (26 C.F.R. 151.23-151.24). Once so registered, importers, manufacturers, producers, and compounders are subjected to a commodity tax at the rate of 1 cent per ounce on narcotic drugs which have been imported or produced, and which have been sold, or have been removed for consumption or sale (26 U.S.C. 4701; 26 C.F.R. 151.121, 151.125-151.126). The commodity tax is paid in the following manner: When the narcotic drug is imported, or produced and set aside for consumption or sale, the importer or producer must purchase from the district director of Internal Revenue adhesive tax stamps representing payments of the appropriate tax; these stamps are, in turn, affixed by the importer or producer to each package or container (according to the respective weight) prior to sale (26 U.S.C. 4771; 26 C.F.R. 151.128-151.130). To ensure that these drugs will not reach the illicit market, no person is allowed to deal in narcotic drugs which are not in a stamped package or container (26 U.S.C. 4704(a), one of the statutes violated by petitioner). Moreover, the Act makes explicit the conditions under which the narcotic drugs may be sold. With the exception of drugs dispensed directly by physicians or under written prescriptions (26 U.S.C. 4705(c)), all transfers of narcotics must be made pursuant to an order form given to the transferor by the transferee (26 U.S.C. 4705(a); 26 C.F.R. 151.141). In order for a prospective pur-

chaser to acquire the order form which he must give to his intended seller, he must make an application to the district director, showing *inter alia* that he is properly registered under the provisions of 26 U.S.C. 4722 (26 U.S.C. 4705(f); 26 C.F.R. 151.142-151.143). It is unlawful to obtain order forms for any purpose other than in connection with the "conduct of a lawful business" or with "the legitimate practice of his profession" (26 U.S.C. 4705(g)). A sale of narcotic drugs not in pursuance of an order form is punishable under the provisions of 26 U.S.C. 4705(a).

It is clear, therefore, that under this statutory plan petitioner was not compelled to register and thereby incriminate himself. The only persons compelled, and indeed, allowed, to register are those who are qualified to deal in narcotics under state law—a class to which, it is not disputed, petitioner does not belong.

In *Leary* v. *United States*, *supra*, this Court has granted review of the question whether the order form and tax provisions of the Marihuana Tax Act (26 U.S.C. 4741-4744) violate the privilege against self-incrimination as applied in *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; and *Haynes* v. *United States*, 390 U.S. 85. In *Leary*, however, an element of the crime for which that petitioner was convicted—transportation of non-tax paid marihuana (26 U.S.C. 4744(a)(2))—was his failure, as a purchaser, to have applied for and obtained an order form—actions which Leary claims would have been incriminating. Here petitioner was not convicted for his failure to register, but for his

conduct of selling heroin not in a stamped package and not pursuant to an order form obtained by a properly registered transferee (26 U.S.C. 4705(a)). These statutes, like typical criminal statutes, do not punish a failure to make incriminatory disclosures, but rather proscribe certain kinds of conduct which would have involved no disclosures on his part and which petitioner chose to pursue in plain violation of the law. His convictions in no way impinge upon his privilege against self-incrimination.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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